Hamburg Industries *and* Robert C. Williams. Case 11-CA-9780

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 23 March 1982 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Robert C. Williams because he engaged in protected concerted activity. We find merit to the Respondent's exceptions, and for the reasons below we shall dismiss the complaint.

The record discloses that the Respondent is engaged in the business of repairing railroad cars and equipment. The Respondent's employees are represented by General Drivers, Warehousemen and Helpers, Local No. 509, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union). The Respondent and the Union are parties to a contract which requires an employee to present his grievance to his immediate supervisor at the first step of the grievance-arbitration procedure. The contract also contains a clause which provides with some exceptions that "[s]upervisory employees shall not perform any work regularly performed by bargaining unit employees."

Employee Williams had a conference with the Respondent's Personnel Manager Harless on 29 January 1981.[1] Williams complained to Harless that supervisors had been performing bargaining unit work in violation of the contract. Harless acknowledged that such a problem existed, but specifically told Williams not to "go out and confront supervisors and try to stop them from doing what they were doing." Harless reminded Williams that he did not have the authority to give instructions to supervisors, and he conducted a step-by-step review of the grievance procedure with Williams. Harless particularly emphasized that the contract required Williams to contact his immediate supervisor first if he wished to file a grievance. During the conference Williams also complained that the Respondent's supervisors had disciplined one of his friends and had discharged another.[2]

During the afternoon of the same day, Williams observed Supervisor Roger Holmes, who was not his supervisor, attempting to unjam two freight cars while approximately four employees were standing idle. Williams immediately prepared a note which read as follows:

> Date 1-29-81 time 12:25 PM
>
> Written warning, Roger Holmes pulling cable while employees standing by watching
>
> complantant [sic] R. C. Williams
> shop stewart [sic]
>
> 1-29-81/12:35PM complant [sic] against——
>
> refused to sign witness

After Holmes had completed the job Williams asked him to sign the note, but Holmes refused. The judge found that when Williams prepared the "written warning" he intended to deliver it to his shop steward and to file a grievance about the incident. However, Williams did not consult the shop steward and never filed a grievance.[3]

Holmes reported the incident to his superiors, Quality Control Manager Richard Townsend and General Supervisor Richard Wolbert. Townsend spoke with Williams and asked who had given him the authority to take such action, but Williams simply replied that "supervisors are not supposed to work." Townsend and Wolbert then informed Harless of the incident, and Harless called both Holmes and Williams into his office and asked for an explanation. After hearing what had happened, Harless first suspended Williams and then terminated him on 3 February by sending him a letter reading as follows:

> On Thursday, January 29th, you attempted to issue a written warning to a supervisor for performing work which you interpreted as not allowed by the contract. In taking this action, you left your work station without authorization, you interrupted the activities of that supervisor and you displayed an insubordinate attitude in that incident.

[1] Unless otherwise specified all dates herein refer to 1981.

[2] In light of our dismissal of the complaint, we find it unnecessary to consider the Respondent's contention that Williams' conduct was prompted by his displeasure with the Respondent's treatment of his friends.

[3] Williams eventually filed a grievance concerning his discharge, but it was rejected as untimely.

> You have previously been warned by your supervisor and myself that such action on your part was not your responsibility and you were instructed to handle operational problems through your immediate supervisor. Because of the seriousness of your actions in this incident, you are hereby terminated from employment with Hamburg Industries.
>
> A copy of this letter will be given to your shop steward, the local union, and placed in your permanent personnel file.

To determine whether an employee's conduct is protected by the Act, the Board forges "an adjustment between the undisputed right to self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline in their establishments."[4] The judge correctly noted that Section 7 protects an employee's right to file and process grievances.[5] He was also correct in observing that, while the Act provides "some leeway for impulsive behavior,"[6] an employee who engages in sufficiently flagrant or egregious conduct can lose the Act's protection.[7] The judge concluded that Williams' conduct was not sufficiently egregious to remove him from the protection of the Act. After carefully weighing the unusual circumstances in this case, we strike the balance to conclude that Williams' conduct was not protected.

The issuance of disciplinary warnings is a province normally reserved to supervisors. Williams tried to turn the tables by issuing a written warning to Holmes, and in so doing he ridiculed Holmes by mocking his authority to impose discipline on employees. Williams' attempt to secure Holmes' signature on the document constituted a flagrant challenge to Holmes' authority, and, contrary to the judge, we see no reason why the Respondent should be required to condone the written warning simply because it was without force or effect. An employer has a legitimate interest in maintaining order and respect in the workplace,[8] and in order to promote that interest it may properly condemn insubordinate behavior by its employees. We find that Williams' conduct constituted unprotected insubordination.

That Williams may have intended eventually to file a grievance does not diminish the gravity of his conduct and does not establish a connection between the written warning and the grievance procedure. Indeed, Williams was specifically instructed in how to use the grievance procedure by the Respondent and chose to ignore those instructions. In sum, we are of the view that Williams' conduct was too far removed from the contractual process to be considered protected. In this connection we also find this case to be clearly distinguishable from the cases cited by the judge in each of which at least one employee had directed profanity at a management official while pursuing the settlement of a grievance.[9] Grievance proceedings often generate heated debate, and in some circumstances the use of profanity need not be inconsistent with a good-faith effort to resolve a grievance.[10] In our view, subjecting a supervisor to ridicule and mocking his authority is not analogous to the conduct exhibited in those cases.

In view of the foregoing, we conclude that Williams' attempt to issue a written warning to Holmes was unprotected. We shall therefore dismiss the complaint.[11]

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

Contrary to the majority, I find the judge's analysis in this case sound in all respects. I would therefore find, for the reason stated by him, that employee Robert C. Williams engaged in protected concerted activity when he complained to Supervisor Roger Holmes that Holmes was performing bargaining unit work in direct violation of a contract clause prohibiting supervisors, in most circumstances, from performing "any work regularly performed by bargaining unit employees," and that by discharging Williams for this conduct the Company violated Section 8(a)(1) of the Act.

The facts are not in dispute. On 29 January 1981, Williams saw Supervisor Holmes doing unit work while employees stood idle watching. Williams prepared a note saying "Roger Holmes pulling cable while employees stand by watching" and, after Holmes completed the job, handed the note to Holmes and asked him to sign it. Earlier that same day Williams had complained to Personnel Manag-

[4] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945); *Southwestern Bell Telephone Co.*, 200 NLRB 667, 669 (1972).

[5] *OMC Stern Drive*, 253 NLRB 486 (1980); *Caterpillar Tractor Co.*, 242 NLRB 523 (1979).

[6] *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965); *F. W. Woolworth Co.*, 251 NLRB 1111, 1114 (1980), enfd. 655 F.2d 151, 154 (8th Cir. 1981).

[7] *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982); *Union Carbide Corp.*, 171 NLRB 1651 fn. 1 (1968).

[8] *Fibracan Corp.*, 259 NLRB 161 (1981).

[9] *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970); *NLRB v. Thor Power Tool Co.*, above; *Hawthorne Mazda*, 251 NLRB 313 (1980); *Postal Service*, 250 NLRB 4 (1980).

[10] See generally *Hyatt on Union Square*, 265 NLRB 612, 616 (1982).

[11] In view of our finding, we do not reach the issue of whether Williams' conduct was concerted under the theory set forth in *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

er Harless that supervisors had been performing unit work in violation of the contract. Harless acknowledged the problem, but told Williams not to go out and confront supervisors and try to stop them from doing what they were doing, suggesting that he take the matter up with his own supervisor. The contractual grievance procedure, apparently reviewed by Harless at this meeting, begins with the aggrieved employee taking the grievance to his immediate supervisor and culminates in final and binding arbitration. When Harless later learned of the incident involving Holmes, he suspended Williams, and on 3 February discharged him for insubordination.

The judge found that Williams was raising a grievance within the terms of the collective-bargaining agreement when he confronted Holmes and that consequently, he was engaged in protected concerted activity.[1] I would adopt these findings. Like the judge, I reject the argument that Williams' actions were removed from the protections of the Act because he raised his complaint regarding a contract violation directly with the offending supervisor rather than first bringing it to the attention of his own supervisor.[2] This is particularly true where, as here, the grievance was aired without disrupting operations, only hours after Williams had unsuccessfully attempted to resolve this recurring contractual breach with Harless, the personnel manager. Even assuming that Williams' presentation of the grievance could be construed as insubordination—an assumption neither I nor the judge would make—it hardly approached the degree of insubordination necessary to remove from Williams the statutory protection to which he is otherwise entitled by virtue of his assertion of a claim under the contract.[3] Surely, Williams' conduct was not of such a nature as to render him unfit for future service.[4] Nor is there any evidence to suggest that Williams deliberately acted in defiance of Harless' suggestion that he take up his protests regarding contractual work breaches by supervisors with Williams' immediate supervisor.[5] Rather, the facts indicate that Williams' conduct, which did not interfere with the Respondent's operations, was a spontaneous reaction to his observing Holmes' performing unit work. Under these circumstances, I would adopt the judge's finding that Williams' discharge for protesting contract violations by supervisors violated Section 8(a)(1) of the Act.

[1] The judge also found that the Respondent has failed to establish that Williams wrote the note to Holmes in retaliation for certain disciplinary action taken by company supervisors against Williams' friends.

[2] *OMC Stern Drive*, 253 NLRB 486 fn. 2 (1980).

[3] *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[4] *Hawthorne Mazda*, 251 NLRB 313 (1980); *Kayfries Inc.*, 265 NLRB 1077, 1086–1089 (1982).

[5] Compare *Fibracan Corp.*, 259 NLRB 161 (1981) (wherein an employee, when warned against using profanities directed at management, defiantly repeated the identical offensive language and was found to have lost the protections of Sec. 7 of the Act.)

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Aiken, South Carolina, on February 8, 1982. The charge was filed by Robert C. Williams, an individual, Williams, on March 24, 1981,[1] and the complaint was issued on May 8 alleging that Hamburg Industries (the Company or the Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by discharging Williams on February 3. The issue presented is whether the activity for which Williams was in fact discharged constituted union activity protected under Section 8(a)(3) and (1) of the Act and/or concerted activity protected under Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the oral argument of the General Counsel advanced at the hearing and of the argument and brief filed by the Respondent subsequent to the hearing, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Georgia corporation with a facility and place of business in Augusta, Georgia, where it is engaged in the repair of railroad cars and equipment. During the 12 months preceding issuance of the complaint, the Respondent performed services valued in excess of $50,000 for customers located outside the State of Georgia and during the same period of time received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Georgia. The Respondent by its answer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The complaint alleges, the answer admits, and I find that the General Drivers, Warehousemen and Helpers, Local No. 509, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Discharge of Williams*

The material facts in this case are largely undisputed. Williams was hired by the Respondent on February 8, 1978, and on the date of the event which precipitated his discharge he was working as a toolcrib attendant under Supervisor Tom Strelec. The Respondent admits that Williams was considered as a generally good employee

[1] All dates are in 1981 unless otherwise stated.

who had previously received favorable performance evaluations by his superiors.[2] Williams' testimony that he was at one point offered a promotion which he rejected was not contradicted by the Respondent. Moreover, the Respondent concedes that Williams had received no prior warnings under the Respondent's progressive disciplinary procedures, which provided for verbal warnings, written warnings, suspensions, and finally discharge in cases of repeated infractions of the Respondent's rules and policies.

The employees of the Respondent were represented by the Union which had a collective-bargaining agreement with the Respondent effective from May 1, 1979, to May 1, 1982. That agreement contained a grievance procedure under article VII, section 7.1, which begins with the aggrieved employee taking the grievance to his immediate supervisor at step 1 and culminates ultimately in final and binding arbitration. Step 2 of the procedure provides for reducing the grievance to writing signed by the employee and the union steward and presenting it to the employee's department head, while step 3 provides for a meeting between the personnel manager, the general manager, and the union business agent. Finally, the procedure specifically provides, "Nothing in this Agreement shall be construed as prohibiting an employee from presenting a grievance directly in steps 1 and 2." Williams had at one time been a member of the Union while employed by the Respondent but had withdrawn from the Union in February 1980 because of his disatisfaction with the collective-bargaining agreement.

On the morning of January 29, Williams had a conference with Personnel Manager Dan Harless in Harless' office.[3] It is clear from both the testimony of Harless and Williams that Williams discussed with Harless Williams' complaint that supervisors were doing bargaining unit work. According to Williams, Harless told him that he had been trying for years to keep the supervisors from doing any bargaining unit work. It is clear that under the collective-bargaining agreement, article XV, section 7, supervisors are prohibited from performing any work regularly performed by bargaining unit employees. However, certain exceptions were noted. More specifically, supervisors were allowed to perform bargaining unit work "in emergencies, in the assistance or instruction or training [of] employees, in developing production processes, troubleshooting, when requested by the employee or employees performing the particular job in question, when specialized training or ability is needed and is not possessed by the employee or employees performing the job, when necessary to prevent impairment of product quality, loss of production or danger to person(s) or property, [or] when employee's [sic] are absent or late."

According to Williams, Harless said in the discussion it was not Williams' position to file grievances on the matter but directed Williams to take the matter up with his own supervisor. Williams then returned to his own work position located in the toolcrib, a fenced-in enclosure located near the front and center of the main shop facility and in the center of the four rail lines running through the shop facility.

Around 12:25 p.m. on January 29 Williams observed Supervisor Roger Holmes working to unjam two freight cars on the number 2 rail line. Williams identified about four other employees who worked on that line who were standing around. Williams testified that he wrote himself a note on the matter, dated it, and signed it himself and intented to turn it in to the shop steward. It is undisputed, however, that instead of turing the note in to the shop steward, Williams walked out of the toolcrib, called to Supervisor Holmes, and motioned to him to come over to the toolcrib. When Holmes got to the toolcrib, Williams presented Holmes with the note that he had written and asked him to sign it. Holmes refused and walked away.

Williams' note was entered into evidence as General Counsel's Exhibit 4 and contained the following writing:

> Date 1-29-81 time 12:25 PM
> Written warning, Roger Holmes pulling cable while employees standing by watching.
>
> complantant[sic] R.C. Williams
> shop stewart[sic]
>
> 1-29-81/12:35PM complant[sic] against——
>
> refused to sign witness

Holmes reported the matter to his superiors Richard Townsend and Richard Wolbert, who each also went to see Williams' memo at the toolcrib. Wolbert and Townsend reported the matter to Harless, who called Holmes and Williams to his office where he talked to them in the presence of Wendall Seymore, the head of the department in which Williams worked. Holmes related the facts of the situation and Williams concurred in the facts as related by Holmes. Harless then suspended Williams. Then subsequently on February 3 the Respondent terminated Williams by letter from Harless to Williams stating as follows:

> On Thursday, January 29th, you attempted to issue a written warning to a supervisor for performing work which you interpreted as not allowed by the contract. In taking this action, you left your work station without authorization, you interrupted the activities of that supervisor and you displayed an insubordinate attitude in that incident.
>
> You have previously been warned by your supervisor and myself that such action on your part was not your responsibility and you were instructed to handle operational problems through your immedi-

[2] Nothwithstanding such admission the Respondent alluded to certain difficulties Williams had in his work just prior to his suspension and discharge which the Respondent's former personnel manager Don Harless testified were considered in deciding to terminate Williams. However, since Harless also conceded that the primary motivating factor for Williams' discharge, which the General Counsel contends was unlawful, was Williams' conduct in issuing a "written warning" to a supervisor I find it unnecessary to consider any of Williams' other "difficulties."

[3] Harless' testimony was that the discussion with Williams took place at the request of Williams' supervisor Tom Strelec. Williams, on the other hand, claimed the discussion and meeting with Harless was pursuant to Williams' own request. I credit Williams, who was not specifically contradicted on this point by Strelec.

ate supervisor. Because of the seriousness of your actions in this incident, you are hereby terminated from employment with Hamburg Industries.

A copy of this letter will be given to your shop steward, the local union, and placed in your permanent personnel file.

B. *Contentions and Conclusions*

The General Counsel's position is that Williams in preparing the memo and presenting it to Holmes was engaged in a protected concerted activity under the Act. His contention is bottomed on the premise that Williams was attempting to enforce the provisions of the collective-bargaining agreement and thus his conduct "an extension of the concerted activity giving rise to the collective bargaining agreement." *Bunney Bros. Construction Co.*, 139 NLRB 1516 (1962); *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

The Respondent argues, on the other hand, that Williams' conduct, which it characterized as "bizzare," was wholly personal and unrelated to any attempt to enforce a contractual provision. Rather, in the Respondent's view, Williams' conduct for which he was discharged did not involve the filing of a grievance but rather was an extension of a personal quarrel with supervisors in general, and was designed to harass a supervisor. In this regard, the Respondent claims that Williams was prompted to harass Holmes because he was angry at certain of the Respondent's supervisors for having disciplined employees who were friends of Williams. Thus, in support of this contention, Harless testified that in his discussion with Williams on the morning of January 29 Williams, in addition to complaining about supervisors doing bargaining unit work, mentioned the fact that one of his friends (Mills) had been disciplined and one (Odum) was discharged.[4] An affidavit of Williams' supervisor Strelec, produced by the Respondent,[5] also noted that Williams had told Strelec sometime during the day of January 29 that "if the company could discipline two friends of mine then I can write up supervisors."[6] Accordingly, the Respondent asserts that Williams' issuance of the written warning to Holmes was an individual and personal act of harassment.

The Respondent further argues that Williams' activity was not protected because it did not reasonably relate to the ends sought to be achieved. Thus, with an established grievance procedure, the argument goes, Williams' issuance of a written reprimand to a supervisor as a way of enforcing the contract was an unreasonable and unprotected means to the end sought. Finally, the Respondent contends that even if Williams' conduct could be initially regarded as protected he lost the protection of the Act by engaging in unreasonable and outrageous conduct, i.e., the issuance of a "written warning" to a supervisor.

It is well established that under Section 7 of the Act employees have a protected right to file and process grievances. *OMC Stern Drive*, 253 NLRB 486 (1980); *Caterpillar Tractor Co.*, 242 NLRB 523 (1979); *Thor Power Tool Co.*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Top Notch Mfg. Co.*, 145 NLRB 429 (1963). That protection attaches whether or not the grievance is meritorious. *Interboro Contractors*, supra. And the basis for the existence of this protection is the proposition, cited by the General Counsel, that employee conduct in filing a grievance pursuant to terms of a collective-bargaining agreement is but an extension of the concerted activity giving rise to the agreement. *Bunney Bros. Construction Co.*, supra.

In the instant case, it is quite clear that Williams in both his meeting with Harless on the morning of January 29 and in his subsequent confrontations with Holmes was concerned with supervisors doing bargaining unit work. Such work by supervisors was prohibited in the collective-bargaining agreement absent certain exceptions. Williams was therefore, I conclude, asserting a complaint or concern arising within the framework of the agreement so that under normal circumstances the protection of the Act would extend to him in voicing his complaint regarding Holmes' conduct on January 29. Moreover, while not necessary for the extension of protection, it appears that Williams' complaint against Holmes had merit, for no contention was made by the Respondent that Holmes' conduct fit within any exception of the bargaining unit agreement prohibiting supervisors from doing unit work. Further, that there was a problem generally with supervisors doing bargaining unit work was revealed by Harless' admission to Williams on the morning of January 29 of the existence of a longstanding problem with supervisors doing bargaining unit work.

The protection normally accorded to the voicing of complaints or grievances arising under a collective-bargaining agreement can be lost, however. As stated by the administrative law judge with apparent Board approval in *Caterpillar Tractor Co.*, supra at 530, Section 7 of the Act "does not permit employees to use grievances as a sword to gain immunity from the consequences of harassment." Accordingly, an employee who files a grievance or voices a complaint with insincerity and simply to harass may find himself without the protection of the Act.

In the instant case there is credited evidence of Harless already noted, that Williams had ulterior motivations in voicing his complaint to Harless about supervisors' performance of bargaining unit work. Strelec's affidavit also would suggest that Williams was prompted in his action with regard to Holmes by the Respondent's discipline accorded to Williams' friends. However, I find more credible Williams' denial of the bare allegation contained in Strelec's affidavit which could not be subjected to cross-

[4] Holmes in his testimony admitted having disciplined one Ronnie Mills a short time before January 29, and Harless testified Odum was discharged the week of January 29.

[5] Because Strelec was unable to testify due to poor health, Strelec's affidavit was received in evidence over the General Counsel's objection. Fed.R.Evid. 804(a)(4) and 804(b)(5). The General Counsel did not object to the authenticity of Strelec's affidavit or the legitimacy of his reason for not testifying, a reason substantiated by a letter from Strelec's doctor also received in evidence.

[6] Williams did not acknowledge any particular friendship with Mills and denied knowledge of any discipline accorded to Mills. However, he did not specifically deny Harless' testimony regarding an allusion by Williams to the discipline of two friends. Harless' testimony appeared sincere and I credit it where not specifically denied by Williams.

examination. There was also the testimony of Richard Townsend, the Respondent's quality control manager, regarding an ulterior motivation on Williams' part. Townsend testified that when he went with Holmes to Williams to see the "written warning" he asked Williams if he had written up Holmes and Williams replied, "You're damned right." And when Townsend asked what for, Williams replied, "Well, they wrote a friend of mine up here a while back for not working and Roger's [Holmes] got three people over there not working." Townsend asked who had given Williams authority to write someone up and Williams answered that Harless had that morning. Williams in his testimony denied that anything was said to him by Townsend or Holmes at the time they came over together to view the written warning. Holmes' testimony did not corroborate Townsend's except to the extent of the question of Townsend to Williams as to who had given him authority to write the warning. Holmes testified that Williams had simply replied, "The supervisors are not suppose[d] to work." I believe Townsend was overstating what actually transpired, and I do not credit that portion of his testimony not supported by Holmes. On the other hand, I do not find Williams' testimony that nothing was said likely or believable. I believe, considering the testimony of all three witnesses in this encounter, that Holmes' version is the most likely and credible one. That version does not suggest or indicate an ulterior motivation on Williams' part.

There is evidence on the other hand that supports Williams' sincerity in taking the action he did. His sincerity is indicated by his complaint to Harless before Williams wrote out the written warning. It is further enhanced and supported by the apparent merit of the complaint. I also specifically credit Williams' explanation, which I find reasonable and credibly delivered, as to why he gave the written warning to Holmes. Thus, Williams related that he asked Holmes to sign the "warning" because he wanted Holmes to be aware that he was going to file a grievance against him. Further, Williams related that he had not initially taken the matter up with the Union because he was not a union member and he did not feel the Union had been fulfilling its duties toward the employees. Had Holmes signed the warning, Williams testified, Williams would have turned it in to the Union, apparently with the hope that it would have been more effective.[7] I am thus not able to assign a wholly insincere motivation in Williams' conduct and I conclude his actions herein were not solely to harass the Respondent.

Moreover, and in any event, that Williams may have also been prompted to some extent by what he deemed to be unfair treatment accorded his fellow employees in other respects does not dictate a finding of unprotected harassment. Grievances often are prompted by an employee's dissatisfaction with elements of his work situation which are not limited to, or find complete expression in, the filing of a particular grievance. The development of animosity between an employee and a supervisor might well serve to prompt the filing of a grievance on a matter which the employee might have well been willing, absent such animosity, to overlook. But a finding that a mixed motive on the part of an employee in filing a grievance would serve to preclude resort to a contract and the protection of the Act which otherwise attaches thereto would also serve to discourage employees from the assertion of legitimate contractual claims. Accordingly, I would not find here that Williams was deprived of his right to assert contractual claims and the protection of the Act connected thereto because he may have been motivated in part by the Respondent's treatment of other employees which he considered to be unfair. I therefore conclude that any loss of protection of Williams in his action must be premised on some other grounds.

It is true that Williams did not formally file a grievance in the instant case. But there is no dispute that Williams was asserting a claim arising under the collective-bargaining agreement which at section 7.1 defined a grievance as "a dispute raised by an employee with respect to the meaning, interpretation or application of an express provision of this Agreement." Therefore, Williams was clearly raising a "grievance" within the terms of the bargaining agreement.

It is also true, as Respondent argues, that Williams did not initially take his grievance about Holmes up with his immediate supervisor as outlined under the steps of the grievance procedure. I conclude, however, that Williams' conduct had as its end the filing of a grievance. He testified that he intended to file a grievance on Holmes' violation of the agreement and I credit that testimony because on the written warning Williams had provided space for the shop steward to sign. If he had no intention of bringing it to the steward's attention, it is highly unlikely that he would have provided such a space.

Williams' failure to take up the Holmes matter with his own supervisor Strelec first I regard as a purely technical breach of the grievance machinery which does not justify removal of protection of the Act. See *OMC Stern Drive*, supra. Moreover, it is to be observed in this regard that Williams had already expressed his general concern over supervisors engaging in unit work to Harless that very morning. There was no reason for Williams to expect that his own supervisor could remedy the problem at the first step of the grievance machinery when the complaint was directed at another supervisor, particularly after Williams' general complaint to Personnel Manager Harless had been unproductive. The contract clearly does not prohibit an employee from filing a grievance against some supervisor other than his own. I conclude that Williams was fulfilling the purposes and intent of the first step of the procedure when he took the matter up directly with Holmes giving him the opportunity to correct, remedy, or deny the existence of the problem him-

[7] While I do not doubt Williams' sincerity in his testimony to the effect that Harless on the morning of January 29 told him it was not Williams' place to file a grievance against a supervisor, I conclude that Williams was mistaken on this point and was testifying to his conclusion rather than a specific statement by Harless. Not only was Harless' testimony to the contrary emphatic and convincing, but also he testified that he went over the grievance procedure with Williams step-by-step. If Harless had instructed Williams not to file a grievance against a supervisor it is improbable that Harless would have taken the time to go over the grievance procedure with Williams.

self. Moreover, and notwithstanding the argument of the Respondent's counsel to the contrary, there was no evidence of a specific work disruption of either Holmes or Williams in Williams calling Holmes over to sign the written warning.

Protection of the Act extends to Williams in the case sub judice unless his conduct was so offensive or egregious as to depart from the res gestae of the concerted activity giving rise to the dispute and put him beyond the protection of the Act. See *Thor Power Tool Co.*, supra; *Houston Shell & Concrete Co.*, 193 NLRB 1123 (1971). Cf. *Calmos Combining Co.*, 184 NLRB 914 (1970). And "where . . . the conduct in issue is closely interwined with protected activity, the protection is not lost unless the impropriety is egregious." *Union Carbide Corp.*, 171 NLRB 1651 (1968). On the other hand, the right of employees to engage in protected concerted activity cannot be exercised without regard to the employer's undisputed right to maintain discipline in its facility. *J. P. Stevens & Co. v. NLRB*, 547 F.2d 792 (4th Cir. 1976). As the Court said in *NLRB v. Thor Power Tool Co.*, supra at 587, "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." Thus, the ultimate decision to be made here is whether Williams' action in asking Holmes to sign a written warning constituted unreasonable, outrageous, and insubordinate conduct which would serve to deprive him of the protection of the Act in the balancing process. In considering this issue I note that the so called written warning was of no force and effect. Williams acknowledged in his testimony that he had no authority to issue a written warning. Williams could impose no discipline upon Holmes for his failure to sign the warning. No breach of the collective-bargaining agreement could be claimed on Holmes refusal to sign.

While Holmes may have considered Williams' request that he sign the warning an act of arrogance and while he may have been shocked by Williams' "audacity," there is little to establish that Williams' conduct independent of the request to sign the warning was insubordinate.[8] The Respondent argues, in effect, that Williams directly violated instructions from Harless. This is based upon the testimony from Harless, which I find credible, that he told Williams on the morning of January 29 that Williams should "not go out and confront supervisors and try to stop them from doing what they were doing," and reminded Williams that he did not have authority to give instructions to supervisors. But Williams did not specifically violate the letter of Harless' instructions. He did not confront Holmes and try to stop him from doing what he was doing while he was doing it. It was only Williams' conduct after Holmes completed his work which provided the basis Holmes' complaint that Williams confronted him. Williams made no attempt to issue any instructions to Holmes and made no threats regarding future conduct. Under these circumstances, I can preceive no direct violation of an order placing Williams' conduct in the category of deliberate insubordination.

The Respondent further argues that "should an employee be permitted as a means of achieving the object of enforcing the contract to issue written warnings to supervisors, a total breakdown of order, discipline and respect for supervision would result." Such an argument presumes the effectiveness of employees' written warnings. Where, as here, Williams warning was of no effect or consequence and was not disruptive it presented no real challenge to authority and constituted no threat to discipline and order. There is no showing that the encounter between Holmes and Williams took place in the presence of other employees. There was thus no possibility of embarrassment of Holmes in the eyes of other emloyees shown. Indeed, if Williams had simply orally told Holmes that he was going to file a grievance against him it is likely that disciplinary action against Williams would never have taken place. No greater significance should be attached to Williams' conduct just because he put his warning in writing.

Finally, even if Williams' conduct may be classified as insubordinate as the Respondent contends, I find that it does not constitute, on balance, insubordination of a degree sufficient to remove from him the statutory protection to which he is otherwise entitled by virtue of his assertion of a claim under the contract. In my view Williams' conduct is no worse than that of employees found by the Board to be protected under the Act notwithstanding their resort to obscenities or vulgarities directed toward management representatives during heated grievance discussions. See, e.g., *Thor Power Tool Co.*, supra; *Crown Central Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970); *Postal Service*, 250 NLRB 4 (1980), *Hawthorne Mazda*, 251 NLRB 313 (1980). Accordingly, I conclude Williams' conduct herein was not so offensive or egregious as to put him beyond the protection of the Act. Therefore, I find his discharge violated Section 8(a)(1) of the Act.[9]

On the basis of the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Hamburg Industries, Augusta, Georgia, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending and discharging Robert C. Williams for engaging in protected concerted activity, thereby interfering with, restraining, and coercing employees in the exercise of their rights, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[8] In this regard I credit Williams' testimony that all he did with Holmes was to ask him to sign the written warning. Holmes' testimony that Williams was "smart alecky" and "disrespectful" at the time of the request to sign was conclusionary and not substantiated by reference to any specific conduct other than Williams' simple request for him to sign "on the dotted line."

[9] I find it unnecessary to determine whether Williams' suspension and discharge also violated Sec. 8(a)(3) of the Act as the General Counsel contends inasmuch as such a finding would not significantly affect the remedy provided herein.

4. The unfair labor practices found above in paragraph 3 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in, and is engaging in, certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act. Having found that the Respondent unlawfully suspended and discharged Robert C. Williams, I shall recommend that the Respondent offer him immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings, he may have suffered as a result of the discrimination against him by payment to him a sum of money equal to that which he normally would have earned absent the unlawful suspension and discharge, with backpay computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[10]

[Recommended Order omitted from publication.]

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716, 717-721 (1962).